

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN MILLS,

Plaintiff-Appellee,

v

RAYMOND TURIN,

Defendant-Appellant,

and

SIMUQUEST, INC.,

Defendant.

UNPUBLISHED

October 15, 2020

No. 350346

Washtenaw Circuit Court

LC No. 18-000980-CB

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Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

Defendant, Raymond Turin, appeals as of right the trial court’s order granting summary disposition under MCR 2.116(C)(10) in favor of plaintiff, John Mills. Defendant argues that the trial court lacked subject-matter jurisdiction and that it erred in its interpretation of the parties’ shareholders’ agreement. We affirm.

**I. BACKGROUND**

This case arises from a business dispute regarding ownership of SimuQuest, a software company. Plaintiff and defendant each own 50% of SimuQuest’s shares. According to plaintiff, defendant was unwilling to work constructively for the benefit of SimuQuest. As a result, plaintiff sent defendant a letter declaring a “stalemate” among the shareholders pursuant to the shareholders’ agreement. In the letter, plaintiff gave defendant the option to purchase plaintiff’s shares for \$730,000 or to sell his 100 shares to plaintiff for the same price. The letter stated that if plaintiff did not receive a written election from defendant by September 9, 2018, plaintiff would assume that defendant was selling his shares, and plaintiff would provide payment of \$730,000 on September 11, 2018, at 4:30 p.m. On September 11, 2018, defendant sent plaintiff a letter in

response to the stalemate offer stating his intent to purchase plaintiff's shares for the price of \$730,000. The letter, however, did not include a date on which the purchase would occur. The letter included a list of conditions that defendant argued were required at closing, such as plaintiff's resignation from the company and his return of company property. Plaintiff sent an e-mail to defendant, asking when defendant expected to settle the purchase. Defendant responded that he would fix the date and time for settlement within the time frame allowed in the shareholders' agreement and that he would notify plaintiff in writing within five days of that date. Defendant stated that the settlement would occur within 60 days.

Plaintiff filed a complaint in the trial court seeking a declaratory judgment regarding who was entitled to purchase the shares under the shareholders' agreement. According to plaintiff, the agreement did not permit defendant an additional 60 days to purchase plaintiff's shares. Plaintiff asserted that defendant sought to prolong the stalemate, which was detrimental to the company. Plaintiff further argued that defendant's counteroffer was not equivalent to plaintiff's offer, which entitled plaintiff to the immediate purchase of defendant's shares. Plaintiff then filed a motion for summary disposition, which the trial court granted. This appeal followed.

## II. ANALYSIS

### A. SUBJECT-MATTER JURISDICTION

First, defendant argues that the trial court lacked subject-matter jurisdiction. "This Court reviews jurisdictional issues de novo." *Detroit v State*, 262 Mich App 542, 550; 686 NW2d 514 (2004). This Court also reviews de novo a trial court's decision on a motion for summary disposition in an action for a declaratory judgment. *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506, 512-513; 810 NW2d 95 (2011).

MCR 2.605(A) provides:

#### (A) Power to Enter Declaratory Judgment

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

"The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues." *Detroit*, 262 Mich App at 550 (cleaned up). Further, "declaratory relief is designed to give litigants access to courts to preliminarily determine their rights." *Id.* at 550-551. "An actual controversy may exist where declaratory relief is needed to guide a plaintiff's future conduct, and the court is

not precluded from reaching issues before actual injuries or losses have occurred.” *Id.* at 551 (cleaned up). The purpose of an action for declaratory judgment

is to enable parties, in appropriate circumstances of actual controversy, to obtain an adjudication of their rights before actual injury occurs, to settle matters before they ripen into violations of law or a breach of contractual duty, to avoid a multiplicity of actions by affording a remedy for declaring in one expedient action the rights and obligation of all litigants, or to avoid the strictures associated with obtaining coercive relief, when coercive relief is neither desired nor necessary to resolve the matter. [*Lansing Sch*, 293 Mich App at 515-516 (cleaned up).]

Contrary to defendant’s argument on appeal, plaintiff’s complaint did not contain an admission that the trial court would not have jurisdiction of his claim if he sought relief other than a declaratory judgment. In his complaint, plaintiff asserted that defendant’s acceptance of the stalemate offer did not comport with the procedure explained in the shareholders’ agreement, and that defendant was harming the company by delaying the transfer of shares and prolonging the stalemate. Plaintiff raised a breach-of-contract claim for defendant’s alleged failure to abide by the shareholders’ agreement. Therefore, the trial court would have had jurisdiction over the claim if plaintiff had sought relief other than a declaratory judgment. See MCR 2.605(A)(2).

Moreover, an actual controversy existed in this case. The parties disputed the interpretation of the shareholders’ agreement. On the one hand, defendant believed that he had additional time (up to 60 extra days) to close on the purchasing agreement after electing to buy plaintiff’s shares. Defendant also raised several contingencies pertaining to the transfer of company assets that he argued had to occur before he purchased plaintiff’s shares. On the other hand, plaintiff believed that defendant had to close on the purchase within 60 days of plaintiff declaring a stalemate (or at least schedule a closing date within that time). Plaintiff also argued that defendant’s contingencies were not permitted by the shareholders’ agreement, and because defendant failed to elect properly to purchase plaintiff’s shares pursuant to the agreement, plaintiff argued that he was entitled to purchase defendant’s shares. Ultimately, a contractual issue existed for which the parties required guidance before either party transferred his shares to the other party. See *Lansing Sch*, 293 Mich App at 515-516. As a result, an actual controversy existed in this case, and the trial court had jurisdiction over plaintiff’s claim for declaratory relief under MCR 2.605(A).

Additionally, the trial court was not precluded from ruling on plaintiff’s motion for summary disposition simply because plaintiff initially brought a claim for declaratory relief. See *Lansing Sch*, 293 Mich App at 512-513. See also *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). Accordingly, the trial court’s exercise of jurisdiction over plaintiff’s complaint and motion for summary disposition was proper.

## B. CONTRACT INTERPRETATION

Next, defendant argues that the trial court’s interpretation of the shareholders’ agreement was erroneous and that the trial court erred by granting plaintiff’s motion for summary disposition.

When reviewing a motion brought under MCR 2.116(C)(10), this Court must consider the evidence in the light most favorable to the party opposing the motion to determine whether a

genuine issue regarding any material fact exists to warrant a trial. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). An issue of fact exists when the record, “giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ.” *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (cleaned up). The court may not assess credibility or determine facts on a motion for summary judgment. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). This Court also reviews de novo a trial court’s interpretation of a written contract. *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010).

“The goal of contract interpretation is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement.” *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). “Plain and unambiguous contract language cannot be rewritten by the Court under the guise of interpretation, as the parties must live by the words of their agreement. *Id.* at 131 (cleaned up).

In this case, the parties’ dispute involves the provisions of the shareholders’ agreement relating to a “stalemate.” Sections 12.01 and 12.02 provide:

**Section 12.01 Stalemate.** If a material issue arises that is not resolved by the Board or by the Shareholders, and is reasonably considered by any Shareholder of such magnitude as to materially impair the business or operation of the Company, such Shareholder (the “Initiating Shareholder”) may cause one or more of the other Shareholders (each is a “Recipient Shareholder”) to either purchase the Initiating Shareholder’s Shares (pro rata if there are more than one Recipient Shareholders) or sell the Recipient Shareholder’s Shares to the Initiating Shareholder. An Initiating Shareholder wishing to invoke this Section must notify each Recipient Shareholder of such wish and must stipulate a price to be paid per share (the “Stalemate Price”) in such notice.

**Section 12.02 Purchase and Sale.** On receipt of the notice, the Recipient Shareholder may elect either to sell all of such Recipient Shareholder’s Shares at the Stalemate Price or purchase all of the initiating Shareholder’s Shares at the Stalemate Price. Such election by the Recipient Shareholder must be made in writing to the Initiating Shareholder within sixty (60) days after receipt of the Initiating Shareholder’s notice. If there are more than one Recipient Shareholders, this buy or sell election must be made collectively as a group, determined by the choice of the holders of a majority of the shares covered by the offer. If the Recipient Shareholders do not make such election, each Recipient Shareholder is deemed to have elected to sell all of the Recipient Shareholder’s Shares at the Stalemate Price to the initiating Shareholder. Section 10.06 and Section 10.07 will govern the time and place of settlement, and deliveries at settlement. The amount to be paid under this Section must be paid at settlement in immediately available US funds.

Meanwhile, sections 10.06 and 10.07 provide:

**Section 10.06 Time, Place and Terms for Settlement.** All settlements for the purchase and sale of Shares, unless all purchasers and sellers agree otherwise, will be held at the principal executive offices of the Company during regular business hours. The purchaser or purchasers will fix the precise date and hour of settlement (within the time limits allowed by this Agreement) by notice in writing to the seller given at least five (5) days before the settlement date specified. If more than one (1) purchaser is involved in a settlement and the purchasers cannot agree on a precise time of settlement, the President of the Company will fix the precise time of settlement (within the time limits allowed by this Agreement) by Five (5) or more days' written notice to the purchasers and seller. At any closing on a sale of Shares, it is a condition precedent to such closing that the selling Shareholder(s) be released from all personal guarantees of Company obligations.

**Section 10.07 Certificates Delivered.** At settlement, the stock certificate or certificates representing the Shares being sold must be delivered by the seller to the purchasers, duly endorsed for transfer or with executed stock powers attached, with any necessary documentary and transfer tax stamps affixed by the seller. Payments made at settlement must be in immediately available US funds. The seller, if a personal representative of a Shareholder, at the request of a purchaser, must provide prior to settlement evidence reasonably satisfactory to the purchaser of the seller's legal status as personal representative of such Shareholder.

On appeal, defendant argues that the trial court erred by holding that the shareholders' agreement required defendant to make his election to purchase plaintiff's shares and close on the purchase sale within 60 days after plaintiff declared the stalemate. Our review of the record indicates that the trial court made no such finding. The trial court acknowledged that the agreement was silent as to a period in which defendant was required to close on the sale of plaintiff's shares, but the trial court determined that such silence did not give defendant the opportunity to delay the purchase indefinitely without providing a closing date.

Defendant also argues that he was entitled to 60 additional days to close on the purchase after electing to purchase plaintiff's shares. Defense counsel acknowledged at the initial trial-court hearing that a time was not listed in the document, and therefore, the timing had to be "reasonable." Defense counsel further told the trial court that a 60-day period was not reasonable. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014) (cleaned up).

Moreover, defendant was provided additional time to schedule a closing date after he agreed to purchase plaintiff's shares. After receiving defendant's letter accepting plaintiff's stalemate offer, plaintiff sent defendant an e-mail asking defendant to schedule a closing date for the purchase. Defendant responded that he would notify plaintiff of the date in writing and that the date would be within 60 days. Plaintiff filed his complaint, arguing that defendant did not have an additional 60 days. At both hearings, plaintiff appeared to be willing to sell his shares if defendant was ready to buy. In fact, at the final hearing, plaintiff specifically complained that defendant failed to schedule a closing date. As a result, defendant was not required to complete the purchase within 60 days of plaintiff's stalemate declaration. Plaintiff's position was that

defendant could not indefinitely extend the stalemate by failing to schedule a closing date. The trial court agreed.

Section 12.02 of the shareholders' agreement does not specify a specific time for the purchasing shareholder to schedule a closing date. Rather, it only specifies that the election must be made within 60 days of receiving notice of a stalemate declaration. Section 12.02 does, however, state that § 10.06 "govern[s] the time and place of settlement." Section 10.06 states that the "purchaser or purchasers will fix the precise date and hour of settlement (within the time limits allowed by this Agreement) by notice in writing to the seller given at least five (5) days before the settlement date specified." Therefore, the shareholders' agreement did require defendant to schedule the precise date and time of settlement by notice in writing to plaintiff at least five days before the settlement date. There is no indication in the record that defendant ever scheduled the settlement date. In contrast, plaintiff's stalemate notice contained a proposed settlement date and time for plaintiff to purchase defendant's shares. Defendant failed to schedule a settlement date even throughout the trial-court proceedings. Defendant failed to make a proper election to purchase plaintiff's shares. It would be unreasonable to interpret the contract to require the purchasing shareholder to make the election to purchase the seller's shares within 60 days, but delay scheduling a settlement date indefinitely. Therefore, plaintiff was entitled to purchase defendant's shares pursuant to the shareholders' agreement.

Finally, defendant argues that a trier of fact should interpret the shareholders' agreement because its language was ambiguous and that a trier of fact should determine whether plaintiff properly declared a stalemate. Defendant did not present either of these arguments to the trial court. Although defendant asserted that plaintiff's motion for summary disposition should be denied, he argued that the parties could settle outside of court, and urged the trial court to find the existence of a factual dispute that precluded summary disposition. We decline to address defendant's arguments raised for the first time on appeal. *Porter v Porter*, 285 Mich App 450, 464; 776 NW2d 450 (2009).

Affirmed. Plaintiff, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Brock A. Swartzle  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello